IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 231

ANGELIKA L. SCHNEIDER, *Petitioner*,

v.

DEAN RUSK, individually, and as Secretary of State, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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July 13, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

DEAN RUSK, individually, and as Secretary of State, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable Chief Justice of the United States and the Associates Justices of the Supreme Court of the United States:

Angelika L. Schneider, petitioner herein, by her attorneys, prays that a writ of certiorari issue to the Court of Appeals to review the decision of that Court in this case.

OPINIONS BELOW

No opinions were issued by the courts below. The District Court without an opinion entered an Order and Judgment on August 17, 1960 (Appendix A) granting respondent's motion for judgment on the

pleading and dismissing the complaint. The United States Court of Appeals for the District of Columbia Circuit issued a judgement on May 11, 1962 (Appendix B) affirming the judgment of the District Court on the authority of a prior decision of that Court, *Lapides v. Clark*, 176 F.2d 619 (D.C. Cir. 1949). The majority and dissenting opinions in *Lapides* v. *Clark* are set forth in Appendix C.

JURISDICTION

Petitioner brought this action for Declaratory Judgment in the District Court pursuant to Section 11-306 and 11-306 of the District of Columbia Code, 28 U.S.C. § 2201, 2202, 2282 and 5 U.S.C. § 1009. A similar procedure was recently sustained by this Court in *Rusk* v. *Cort*, —— U.S. ——. (April 2, 1962)

Final Judgment adverse to petitioner was entered by the District Court August 17, 1960 and a timely appeal followed. The Court of Appeals on May 11, 1962 entered a judgment affirming the order of the District Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Section 352(a)(1) of the Immigration and Nationality Act of 1952, which provides that any naturalized citizen who resides for more than three years in his country of origin shall lose his American citizenship, has deprived petitioner of her citizenship without due process of law, contrary to the Fifth Amendment, in that that section has subjected her to adverse consequences as a naturalized citizen which are not imposed upon native-born citizens, thereby

discriminating against her solely on the grounds of her birth and national origin.

2. Whether Section 352(a)(1) is beyond the power of Congress to enact because it bears no reasonable relationship to any power granted to Congress.

3. Whether Section 352(a)(1) violates the Eighth Amendment in that it imposes cruel and unusual punishment upon the petitioner.

STATUTE INVOLVED

Section 352(a)(1) of the Immigration and Nationality Act of 1952, 66 Stat. 269, 8 U.S.C. § 1484, reads as follows:

Loss of nationality by naturalized national

(a) A person who has become a national by naturalization shall lose his nationality by—

(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act;

STATEMENT OF THE CASE

Petitioner was born on May 28, 1934, in Rimsting-am-Chiemsee, Bavaria, in what is now the Federal Republic of Germany. At birth she was a national of Germany. In April 1939, before she was five years of age, she was brought to this country by her family. On December 4, 1950, petitioner became a citizen of the United States by derivative naturalization, through the naturalization of her mother (J.A. 2, 9, 16).

Petitioner lived in the United States continuously from 1939 to 1959—from the age of five to the age of twenty. She received all of her schooling in this country and was graduated from Smith College in 1954. Thereafter, on a scholarship given by the Institute of International Relations in New York, she studied for a year in Switzerland and then continued studying for a year in Paris. She returned to the United States in April 1956 (J.A. 2, 9-10, 16).

On June 6, 1956, petitioner left the United States to marry Dr. Dieter Schneider, a German citizen and attorney-at-law practicing in Cologne, Germany, to whom petitioner had become engaged while studying in Paris. Since that time, petitioner lived continuously with her husband in the Federal Republic of Germany, for a period of more than three years, except for one six-week family visit to the United States, in September and October of 1957 (J.A. 2, 10, 16).

The two sons born to petitioner, one in 1957 and the other in 1958 were, at the time of birth, and are now, citizens of the United States, duly registered as such at the United States Consulate (J.A. 2-3, 10, 17).

During all the time of her residence in Germany until June 1959, petitioner was in possession of a valid United States passport. In June 1959 however, the United States Consulate in Dusseldorf refused to grant petitioner an extension of her passport contending that petitioner had lost her United States citizenship. In September 1959, petitioner was requested by the American Consulate to surrender her naturalization certificate which she did under protest. On November 25, 1959, petitioner was served with a "Certificate of Loss of Nationality of the United States" J.A. 3, 10-11, 17-19).

The Board of Review on the Loss of Nationality in the State Department in Washington affirmed, by letter of January 20, 1960, the previous administrative decision that petitioner had lost her citizenship pursuant to Section 352(a)(1) of the Immigration and Nationality Act of 1952. This action was, under the regulation, the "final administrative determination" of the State Department, leaving petitioner without further administrative remedy. Pursuant to this ruling petitioner is now being denied all rights and privileges of United States citizenship, including a United States passport (J.A. 12, 19).

Petitioner is now residing in the Federal Republic of Germany. The authorities in Germany have given petitioner a temporary identification paper as a stateless person and a temporary resident permit which may be withdrawn at any time (J.A. 4, 8-9). Petitioner feels herself to be an American and insists on her status as an American citizen (J.A. 8). She is not a German citizen, nor a citizen of any other country (J.A. 8). She is residing in Germany only because that is where her husband lives and practices his profession (J.A. 10).

PRIOR PROCEEDINGS

On February 1, 1960, petitioner filed a complaint in the District Court for the District of Columbia alleging that Section 352, the provision pursuant to which she is deprived of her citizenship, is invalid under the Constitution of the United States, and seeking a declaration that petitioner is a citizen of the United States as well as certain other relief.

On August 17, 1960 the District Court entered an Order and Judgment (Appendix A) denying petitioner's motion for summary judgment and granting

respondent's motion for judgment on the pleadings, and dismissing the complaint. The Order and Judgment of the District Court recited that "Section 352 (a) (1) of the Immigration and Nationality Act of 1952 is not repugnant to the Constitution of the United States."

Petitioner took a timely appeal to the United States Court of Appeals for the District of Columbia Circuit.

On March 24, 1961, after the case had been fully briefed and oral argument held, the Court of Appeals *sua sponte* postponed its decision in this matter pending decision by this Court of *Herter* v. *Cort*, No. 567, October Term 1960, (*Rusk* v. *Cort*, No. 20, October Term 1961), because, as it now appears, the similarity of the jurisdictional issue involved. On April 25, 1962 the Court of Appeals denied a motion by petitioner asking the Court either to decide the case promptly or to certify the matter to this Court.

Petitioner, thereupon, on May 12, 1961, filed a petition for a writ of certiorari asking this Court to review this case *prior to judgment in the Court of Appeals.* The writ was denied on June 20, 1961, No. 963, October Term, 1960.

On May 11, 1962 after this Court had upheld the right of the respondent in *Rusk* v. *Cort* to challenge by declaratory judgment the denial of his United States citizenship while residing abroad, the Court of Appeals entered an order (Appendix B) affirming the judgment of the District Court dismissing the petitioner's complaint on the merits "on the authority of *Lapides* v. *Clark*, 85 U.S. App. D.C. 101, 176 F.2d 619 (1949)."

REASONS WHY THE WRIT SHOULD BE GRANTED

This case presents an important constitutional issue directly affecting the rights of naturalized citizens to travel and reside abroad. Ultimately the case involves not only the power of Congress to restrict in general terms the residence abroad of American citizens, but also the status of naturalized citizens as equal to the native-born under the Constitution.

This case challenges the constitutionality of Section 352(a)(1) of the Immigration and Nationality Act of 1952, which provides that any naturalized citizen who resides for three years in the country of his origin shall *automatically* lose his American citizenship. No similar provision applies to the native-born.

The issue here is one with which this Court has recently been much concerned—the scope of Congressional power to attach to certain conduct the withdrawal of American citizenship. See *Perez* v. *Brownell*, 356 U.S. 44 (1958); *Trop* v. *Dulles*, 356 U.S. 86 (1958) and two cases now pending before this Court, *Rusk* v. *Cort*, No. 3, Oct. Term 1962 and *Kennedy* v. *Mendoza-Martinez*, No. 2, Oct. Term 1962.

More specifically, the issues presented in this case are (1) whether Congress can discriminate between native-born and naturalized citizens in attaching the consequence of loss of citizenship to the residence abroad of naturalized citizens for stated periods of time, while imposing no similar restrictions on the native-born; and (2) whether Congress, under its foreign affairs powers, can attach loss of citizenship to conduct—such as mere residence abroad—which is completely consistent with continued allegiance to the United States.

1. The Questions Are Important

A. This case is highly significant because it involves the *first* and *only* substantive discrimination between native-born and naturalized citizens that Congress has ever attempted. Section 352 is new. It first became part of our law with the passage of the Nationality Act of 1940.[1] It is the single substantive exception to the deeply rooted principle that native-born and naturalized citizens are equal in every respect (with the single exception of the constitutional provision limiting the Presidency of the United States to the native-born.) See *Luria* v. *United States*, 231 U.S. 9 (1913); *United States* v. *MacIntosh*, 283 U.S. 605-624 (1931); *Knauer* v. *United States*, 328 U.S. 654, 658 (1946). See also *Osborn* v. *The Bank of the United States*, 22 U.S. 738, 827-828 (1824).

If this section is allowed to stand, it will mark the first step in making naturalized citizens second-class citizens.

The challenged legislation is an assertion by Congress of the power to regulate the travel and residence abroad

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[1] Prior to that time, the Act of March 2, 1907, 34 Stat. 1228, had made a distinction between native-born and naturalized citizens, but this was procedural and not a substantive one. The 1907 Act established a rebuttable presumption that a naturalized citizen who returned to the country of his origin for a period of two years had voluntarily abandoned his American citizenship. This presumption ceased upon the return of a citizen to the United States. 28 Op. Atty. Gen. 504 (1910). It was "easy to preclude, and easy to overcome." *United States* v. *Gay*, 263 U.S. 353, 358. It imposed upon the naturalized citizen residing abroad only the burden of avowing his continued allegiance to the United States. It did not, as does the present law, automatically deprive American citizens of their citizenship on grounds of mere residence abroad independly of their wishes.

of naturalized citizens, while leaving native-born citizens free to travel and reside as they please. It is in substance a claim of right on the part of Congress to say to naturalized citizens that they have no right to travel and remain outside the borders of the United States except under terms and conditions which Congress, as a matter of grace, may allow, while no such limitation is made on their fellow citizens who owe their citizenship to birth.

B. This case presents issues similar to those raised in *Perez, Trop, Cort* and *Mendoza* and is of parallel consequence. The issues presented in this case are related with those raised in *Cort* and *Mendoza* in that in each case a statute providing for the withdrawal of citizenship is sought to be justified as a proper exercise of Congress' foreign affairs power.[2] This case should be considered together with *Cort* and *Mendoza*.

C. Unlike *Cort* and *Mendoza*, which involves relatively few citizens, this case is one which directly affects the right of a great number of citizens who acquired their citizenship through naturalization. Although it is not possible to determine how many persons' status may be directly affected by the possible ap-

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[2] In *Cort* and *Mendoza*, it is Section 401(j) of the Nationality Act of 1940, 54 Stat. 1168, now Section 349(a)(10) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1481(a)(10) which provides for the denaturalization of persons who leave the United States in order to avoid the draft. In *Cort* and *Mendoza*, as well as here, the Government argues that Congress under its foreign affairs power may provide for the termination of the citizenship of persons coming within the terms of these respective provisions because their residence abroad as United States citizens is likely to result in complications or frictions with other countries.

plication of Section 352, it is unquestionally a large number. The following figures are available:

There are at present over 670,000 Americans, excluding military personnel, who reside in foreign countries throughout much of the world. Although there are no statistics available as to how many of these are naturalized, it is to some extent indicative that of the some 857,000 United States passports issued during the year 1961, some 105,000 were issued to naturalized citizens.[3]

2. The Questions Have Not Been Resolved By This Court

These questions, we submit, have never been ruled on by this Court.

(a) The question whether any substantive discrimination between naturalized and native-born citizens is permissible by our Constitution has never been resolved by this Court. As noted above, Section 352 represents the first attempt by Congress to impose such a discrimination, and its constitutionality has never been passed upon by this Court.

(b) The question whether Congress, under its foreign affairs power, can attach loss of citizenship to an act which is completely consistent with continued allegiance to the United States—such as residence abroad—was left unresolved in this Court's decision in *Perez* v. *Brownell, supra.* There this Court in upholding the constitutionality of withdrawing the citizenship of those who voted in foreign elections noted (356 U.S. at 60):

> ". . . Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something

[3] Information obtained from State Department Passport Office.

> less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship."

3. The Section Is Prima Facie Invalid

A. Section 352 of the Immigration and Nationality Act applies only to a naturalized citizen. There is no restriction on the right of the native-born citizen to travel or reside abroad as long or for whatever legitimate purpose they desire. As noted above, this section would mark the *first* and *only* substantive discrimination between native-born and naturalized citizens. It is a deviation from long established principle that native-born and naturalized citizens are equal under the law and that Congress may not abridge these rights. See for example, *Luria* v. *United States, supra, Osborn* v. *The National Bank of the United States, supra.* See also dissenting opinion of Mr. Chief Justice Warren in *Perez* v. *Brownell, supra* at 66 where it is stated that:

> ". . . Of course, naturalization unlawfully procured may be set aside. But apart from this circumstance, the status of the naturalized citizen is secure."

B. The Section cannot be justified as an attempt to deal with the problem of citizenship fraudulently obtained or with no bona fide intention to remain. The three year period of foreign residence is an absolute bar without relation to time or circumstances. It operates no matter how long after the naturalization foreign residence is taken up or how unforeseen the reasons for the foreign residence.

In this respect, it is unlike Section 340(d) of the Act, 8 U.S.C. § 1451(d), a predecessor of which

was sustained by this Court in *Luria* v. *United States*, 231 U.S. 9 (1913), which provides that return within 5 years of naturalization to the country of origin creates a rebuttable presumption that the citizenship was not acquired in good faith.[4]

Section 352(a)(1) is applicable independently of the good faith of the naturalization, and whether it took place six months or twenty years previously. The present case presents a clear example. The Government has not suggested, nor could it suggest, any question of good faith in petitioner's naturalization. For it is plain that when Angelika Schneider (née Schaeffer) became naturalized in 1950 at the age of 16, having resided in the United States since 1939, that she could not possibly have known or suspected that she would, years later, meet Dieter Schneider and marry him. Yet the statute seeks to take away citizenship acquired in good faith, on the basis of events not contemplated or foreseeable. If sought to be sustained as an attack on the original naturalization, it would be arbitrary. *Cf. Tot* v. *United States*, 319 U.S. 463 (1943); *Heiner* v. *Donnan*, 285 U.S. 312 (1932).

C. Under *Perez* "the means—in this case withdrawal of citizenship—must be reasonably related to the end—here, the regulation of foreign affairs." 356 U.S. 44 at 58.

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[4] In *Luria* this Court stated, 231 U.S. at 27:

> "* * * But we are of the opinion as the intervening time approaches five years the presumption necessarily must weaken to such a degree as to acquire but slight countervailing evidence to overcome it . . . . So construed we think the provision is not an excess of the power of Congress."

Section 352(a) is broad and general in its terms. The means are not reasonably related to the end. Rather, the Section applies a broad removal of citizenship without regard to necessity or justification. The Section limits the right of naturalized citizens to reside abroad not only in specific areas or under specific circumstances in which the residence abroad of American citizens might be likely to complicate our relations with foreign governments. Indeed it applies to all cases, including those where, as here, residence abroad is plainly not likely to cause frictions with a foreign government. Persons and conduct likely to embarrass the United States in its relations with other governments are dealt with specifically in other sections of the Act. So, for example, special problems arising out of dual nationality are treated in Section 350 of the Act, 8 U.S.C. § 1482. Specific conduct likely to embroil the United States in conflict with foreign governments, such as American citizens voting in foreign elections, serving in foreign armies, or accepting public office in a foreign country, is dealt with in Section 349 of the Act, 8 U.S.C. § 1481, under which such acts are made expatriating.

Section 352 is an assertion by Congress of the power to limit the right of travel and live abroad, not only to specific areas where the residence abroad of American citizens is likely to cause problems, but to all parts of the world irrespective of whether any foreign affairs problem is likely to result.

D. In any event there is a serious constitutional question whether Section 352 would not violate the Fifth Amendment because it appears to proceed from a point of view that naturalized citizens as a class are not quite as loyal or reliable as the native-born. Classification of citizens on the basis of birth is foreign to our system

of law and suspect even when justified by the most extreme wartime emergencies. *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943). See also Judge Edgerton's dissenting opinion in the case which was the basis of the decision by the Court below here, *Lapides* v. *Clark*, 176 F.2d 619 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 360 (1949).[5]

E. Furthermore, there is an important constitutional question as to whether Section 352 is penal in nature and therefore a cruel and unusual punishment in violation of the Eighth Amendment of the Constitution as was the provision in *Trop* v. *Dulles*, *supra*. This is particularly true since the act of residence abroad is an innocent one not one subject to condemnation as criminal. *Cf. Robinson* v. *California* No. 554, Oct. Term 1961, —— U.S. ——, June 25, 1952.

[5] While Judge Edgerton's dissent in *Lapides* is based exclusively on constitutional grounds, the majority opinion in that case could be construed as upholding the constitutionality of Section 352 only when applied to a person whose residence abroad is not shown to be for a valid reason consistent with continued allegiance to the United States. If so construed, Section 352 would create a rebuttable presumption similar to the one sustained by this Court in *Luria* v. *United States*, *supra*. In *Lapides*, the majority opinion states, 176 F. 2d at 621:

> "... He [appellant] points to the failure of the statute to excuse unavoidable delays in returning to this country as evidence of its arbitrary nature. Yet he advances no excuse for his own failure to return within the permitted time. The record reveals no arbitrary application of the statute as to him. So its possible unconstitutional application to others in different circumstances cannot be considered in this case."

The Court of Appeals, however, in making the *Lapides* decision the basis for its judgment in this case seems to be sustaining the constitutionality of Section 352 even where as here the naturalized citizen is residing abroad for a reason clearly consistent with continued allegiance to the United States.

CONCLUSION

For the reasons stated the writ should be granted.

Respectfully submitted,

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July 13, 1962

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 324-60

ANGELIKA L. SCHNEIDER, *Plaintiff*,

v.

CHRISTIAN A. HERTER, individually and as Secretary of State, *Defendant*.

Order and Judgment

Plaintiff having moved for summary judgment and defendant having moved for judgment on the pleadings, and the Court having considered the complaint, the answer and the affidavits filed herein as well as the previous proceedings herein, and being fully advised in the premises, and being advised of the order entered in this matter on July 19, 1960 by Judge Matthews, holding that no substantial constitutional question is presented by said complaint, and the Court being of the opinion that Section 352(a)(1) of the Immigration and Nationality Act of 1952 is not repugnant to the Constitution of the United States,

It is hereby

ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff's motion for summary judgment be and it is hereby denied, and

2. That judgment on the pleadings be and it is hereby entered for defendant, and the complaint be and it is hereby dismissed.

GEORGE L. HART, JR.
Judge

Date: August 17, 1960

No objection as to form:

MILTON V. FREEMAN
Counsel for plaintiff

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,959

ANGELIKA L. SCHNEIDER, *Appellant*,

v.

DEAN RUSK, individually and as Secretary of State, *Appellee*

No. 16,002

DEAN RUSK, Secretary of State, *Appellant*,

v.

ANGELIKA L. SCHNEIDER, *Appellee*

Appeals from the United States District Court for the District of Columbia

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Before: WILBUR K. MILLER, *Chief Judge*, and BAZELON and BURGER, *Circuit Judges*.

Judgment

These appeals came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

On consideration whereof, It is ordered and adjudged by this court

(1) that in No. 15,959 the judgment of the District Court for the defendant on the pleadings and dismissing the

complaint is hereby affirmed on the authority of *Lapides* v. *Clark*, 85 U.S. App. D.C. 101, 176 F. 2d 619 (1949).

(2) that the appeal in No. 16,002 from the order of the District Court denying defendant's motion to dismiss the complaint is dismissed for the reason that the order is not appealable. *Catlin* v. *United States*, 324 U.S. 229, 236.

PER CURIAM.

Dated: May 11, 1962

APPENDIX C

LAPIDES v. CLARK, Attorney General, et al.

No. 9984.

United States Court of Appeals
District of Columbia Circuit.

Argued March 14, 1949.

Decided May 23, 1949.

Writ of Certiorari Denied Oct. 24, 1949.

See 70 S. Ct. 101.

* * * * * * * * * * * *

EDGERTON, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Columbia (now the United States District Court for the District of Columbia).

* * * * * * * * * * * *

Before EDGERTON, CLARK, and PROCTOR, Circuit Judges.

PROCTOR, *Circuit Judge*.

This appeal is from an order of the District Court dismissing the complaint of appellant brought under Title 8,

Section 903 of the United States Code, Annotated, for a judgment declaring him to be a national of the United States and that Section 404 of the Nationality Act of 1940, as amended, 8 U.S.C.A. §§ 804, 809, is inapplicable to him.

Appellant was naturalized in 1928. He went to Palestine in 1934 and remained there until 1947, when, on July 3, he arrived in the United States. He presented his certificate of citizenship to the Immigration authorities at New York. They excluded him upon the ground that he had expatriated himself under Section 804, 8 U.S.C.A., and was an alien without a quota immigration visa. Pertinent parts of the section provide that: "A person who has become a national by naturalization shall lose his nationality by: • • • (c) Residing continuously for five years in any other foreign state, except as provided in section 806 hereof." None of the exceptions apply to appellant. He contends that Section 804 is unconstitutional; therefore, that his American citizenship remains unaffected by his prolonged residence abroad. It is argued that the law arbitrarily discriminates against naturalized citizens, and that no distinction can be drawn validly between them and native born.

"[1-3] Expatriation is a natural and inherent right of all peoples." 8 U.S.C.A. § 800. Congress has implied power to provide therefor. Mackenzie v. Hare, 239 U.S. 299, 311, 36 S.Ct. 106, 60 L.Ed. 297, Ann.Cas.1916E, 645. Obviously it cannot draw arbitrary and groundless distinctions between citizens. Hirabayashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774. However, where classification has reasonable relation to legitimate legislative ends and is supported by considerations of policy and practical convenience, it is not arbitrary. Steward Machine Co. v. Davis, 301 U.S. 548, 584, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293. The guaranty of due process demands only that a law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a reasonable and substantial relation to the object sought to be obtained.

Nebbia v. New York, 291 U.S. 502, 525, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469.

[4] The history of Section 804 accounts for its application to naturalized citizens only. It reveals a recognition by Congress of the need for legislation to lessen friction with foreign governments growing out of disputes as to the nationality of our naturalized citizens and their offspring residing for prolonged periods in foreign lands. See Hearings before Committee on Immigration and Naturalization on H. R. 5127 Superseded by H. R. 9980, 76th Cong., 1st Sess., 134-135, 139-141, 407-409 (1940); Sen. Rep. No. 2150, 76th Cong., 3d Sess. 4 (1940); 86 Cong. Rec. 11948, 11949 (1940); also Excerpts, Appellees' Brief, page 18.

[5-7] The statute has a purpose in the international policy of our government. The Act does not arbitrarily impose a loss of citizenship. It deals with a condition voluntarily brought about by one's own acts, with notice of the consequences. In that sense there is concurrence by the citizen. Mackenzie v. Hare, supra, 239 U.S. at page 311, 36 S.Ct. 106, 60 L.Ed. 297. There the statute, 34 Stat. 1228, provided that any American woman marrying a foreigner should take the nationality of her husband. The distinction thus drawn between female citizens marrying Americans and those marrying foreigners was held not to be an arbitrary exercise of power, as it was dictated by a policy to avoid embarrassments and controversies with foreign governments. In view of this decision, supporting classification as between native born citizens, we cannot doubt that for a similar purpose Congress has the power to distinguish between native born and naturalized citizens. Nor was Section 804 designed to apply retroactively, and it has not been so applied to appellant. He voluntarily remained in Palestine more than five years after the effective date of the Act. He points to the failure of the statute to excuse unavoidable delays in returning to this country as evidence of its arbitrary nature. Yet he advances no excuse for his

own failure to return within the permitted time. The record reveals no arbitrary application of the statute as to him. So its possible unconstitutional application to others in different circumstances cannot be considered in this case. United States v. Petrillo, 332 U.S. 1, 11, 12, 67 S.Ct. 1538, 91 L.Ed. 1877.

[8] We agree with the United States Court of Appeals for the Second Circuit that:

"* * * On the undisputed facts the appellant, a naturalized citizen who had resided continuously in Palestine for over thirteen years, had lost his citizenship by voluntary expatriation beyond the permitted time, * * *. No judicial proceedings were necessary to bring about this change of status. It followed by virtue of the statute which took effect merely through residence abroad and lapse of time. * * *" United States ex rel. Lapides v. Watkins, 2 Cir., 165 F.2d 1017, 1019.

[9] In the foregoing case, and in this, there is a virtual identity of parties and allowable issues. The purpose of each was to secure a determination that appellant is a citizen, to the end that he might obtain release from his present detention and be allowed to enter the country as a citizen. Obviously, he could have attacked the constitutionality of the Act in the habeas corpus proceedings. Had he done so, and prevailed, that would have proven a simple and speedy method of accomplishing his objectives. Evidently sensing that res judicata might apply, he cites here Collins v. Loisel, 262 U.S. 426, 43 S.Ct. 618, 67 L.Ed. 1062, and Wong Doo v. United States, 265 U.S. 239, 44 S.Ct. 524, 68 L.Ed. 999, as authority for the proposition that the doctrine does not apply as to habeas corpus cases, overlooking the fact that the present action is for a declaratory judgment. We wonder what justification there can be for this additional and needless litigation with all its trouble, expense and delay, which the law so much abhors. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 282, 66 S.Ct.

1105, 90 L.Ed. 1230, 167 A.L.R. 110; Angel v. Bullington, 330 U.S. 183, 186, 192, 67 S.Ct. 657, 91 L.Ed. 832. In view of the granting of the motion to dismiss the complaint, the respondents did not answer. That probably accounts for the fact that the habeas corpus case was not pleaded in bar of the present action. Yet evidence of that case is in the complaint itself. However, in view of the peculiar situation, we do not pass upon the question. Yet we do think, under the circumstances, that great weight should be given the conclusion of the court in the New York case, Salinger v. Loisel, 265 U.S. 224, 230, 44 S.Ct. 519, 68 L.Ed. 989; Wong Doo v. United States, supra, 265 U.S. at pages 240, 241, 44 S.Ct. 524, 68 L.Ed. 999. This we readily do, as our own conclusion is entirely in accord that appellant is not a citizen of the United States. Therefore, the judgment of the District Court is

Affirmed.

EDGERTON, Circuit Judge (dissenting).

In my opinion the appellant's expatriation and banishment are unconstitutional on two grounds. Congress may not discriminate against naturalized citizens. Arbitrary discrimination is not due process of law.

The Constitution empowers Congress "to establish an uniform rule of naturalization." Article I, § 8, Par. 4. A "rule of naturalization" regulates eligibility and procedure for becoming a citizen. It increases the number of citizens but does not divide them into classes. By authorizing Congress to prescribe who may be naturalized and how, the Constitution does not authorize it to deprive citizens either at or after naturalization of liberties that other citizens enjoy. "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away." United States v. Wong Kim Ark, 169 U.S. 649, 703, 18 S.Ct. 456, 477, 42 L.Ed. 890. Chief Justice Marshall said in 1824: "A naturalized citizen

* * * becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue." Osborn v. United States Bank, 9 Wheat. 738, 22 U.S. 738, 827, 6 L.Ed. 204. The Supreme Court said in 1913: "Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency."[1] In the Knauer case in 1946 the Court pointed out that "there are other exceptions of a limited character" and, in a footnote, mentioned the Nationality Act.[2] But in that case the Court was dealing with cancellation of an invalid naturalization because of fraud in its procurement. The Court had no opportunity to consider and decide whether a valid naturalization may be terminated because of residence abroad.

Deprivation of liberty by severe and arbitrary discrimination is not due process of law. Aside from the Nationality

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[1] Lauria v. United States, 231 U.S. 9, 22, 34 S. Ct. 10, 13, 58 L. Ed. 101. Cf. United States v. Schwimmer, 279 U.S. 644, 649, 49 S. Ct. 448, 73 L. Ed. 889; Baumgartner v. United States, 322 U.S. 665, 673, 64 S. Ct. 1240, 88 L. Ed. 1525.

[2] The entire footnote reads: "Thus a naturalized citizen must wait seven years before he is eligible to sit in the House (Article I, Section 2) and nine years before he can enter the Senate. Article I, Section 3. Furthermore, a naturalized citizen may lose his American citizenship by residnig abroad for stated periods. Sections 404-406, Nationality Act of 1940, 54 Stat. 1137, 1170, 8 U.S.C. §§ 804-806 [8 U.S.C.A. §§ 804-806]. See Perkins v. Elg, 307 U.S. 325, 329 [59 S. Ct. 884, 886, 83 L. Ed. 1320]." Knauer v. United States, 328 U.S. 654, 658, 66 S. Ct. 1304, 1307, 90 L. Ed. 1504.

Act, citizens may live abroad. By imposing a heavy penalty on the exercise of this liberty the Nationality Act takes part of it away from all naturalized citizens, regardless of their devotion to America and their connections here. All native citizens, regardless of possible devotion to a foreign country and connections there, are exempt. Congress may expatriate citizens on reasonable grounds. No doubt these may include five years residence abroad. But it does not follow that Congress may expatriate some citizens and not others on this ground. The Mackenzie case[3] upheld as reasonable a statute that expatriated women but not men who married aliens. Some distinctions between citizens solely because of their sex are still considered reasonable. Goesaert v. Cleary, 335 U.S. 464, 69 S.Ct. 198. But "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people." Hirabayashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774. Distinctions because of birthplace are equally arbitrary. The fact that the appellant was born in Austria is no reason for penalizing his sojourn in Palestine. Together with the immigration law the Nationality Act makes it in effect a crime punishable by banishment, which may well be called cruel and unusual, for some citizens but not for others to live five years abroad. Even complete inability, from whatever cause, to return to the United States during the five-year period gives no immunity, and a considerable number of foreign-born Americans have therefore been banished by circumstances over which they had no control.[4]

The government does not contend that the habeas corpus case of United States ex rel. Lapides v. Watkins, 2 Cir., 165 F.2d 1017, in which these constitutional questions were not raised, concludes them.

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[3] Mackenzie v. Hare, 239 U.S. 299, 36 S. Ct. 106, 60 L. Ed. 297, Ann. Cas. 1916E, 645.

[4] Involuntary Loss of American Citizenship, p. 16, Report of the Special Committee on Expatriation, National Council on Naturalization and Citizenship (March 1947).